IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO.2581 OF 2004

Kotak Mahindra Bank Limited,
a company incorporated and
registered under the provisions
of the Companies Act, 1956
having its registered office
at 36-38A, Nariman Bhavan,
227, Nariman Point,
Mumbai-400 021. .... Petitioner

- Versus -

1. Nobiletto Finlease &
   Investment Private Limited,
   a company incorporated and
   registered under the
   provisions of the Companies
   Act, 1956 and having its
   registered office at Laxmi
   Building, 4th Floor,
   6, S.V. Road, Ballard
   Estate, Mumbai-400 001.
2. State of Maharashtra
   through the Economic Offices
   Wing, CID, Thane behind

Kalva Police Station,
Near Police Parade Ground,
Thane. .... Respondents

Sarvasri Dinesh Purandare with V.R. Dhond i/b M/s. Kartikeya & Associates for the Petitioner.
Sarvasri A.P. Mundargi with Ganesh Gole for the Respondent No.1.
Sarvasri V.A. Thorat, Advocate General, with D.S. Mhaispurkar, Addl. Public Prosecutor, for the State.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.
DATED: APRIL 5, 2005

JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. Rule. By consent, the rule is made returnable forthwith.

2. The petitioner seeks to quash the complaint dated 6-11-2004 stated to have been filed by the respondent No.1 with the respondent No.2 and further, for the direction to restrain the respondent No.2 from carrying out the investigation in relation to the said complaint.

3. It is the case of the petitioner that in the course of its regular business, it had sanctioned loan to the respondent No.1 and accordingly had disbursed an amount of Rs.1,45,00,000/- in terms of the loan agreement dated 15-9-2000. Having obtained the said loan, the respondent No.1 issued three post-dated cheques - one dated 1-7-2002 towards the repayment of the principal amount of Rs.1,45,00,000/- and the remaining two dated 15-9-2001 - one for a sum of Rs.18,09,600/- towards the interest payable upto 15-9-2001 and another for Rs.14,32,807/- towards the interest payable for the period from 15-9-2001 to 30-6-2002. The cheques towards the interest payment were issued after deduction of the tax at source. The respondent No.1 also deposited the shares of various companies by way of pledge in pursuance of the said loan agreement. The respondent No.1 committed various defaults with regard to the maintenance of the margin of the securities as well as on account of non-payment of the interest, and therefore, a notice dated 24-11-2001 was issued to the respondent No.1 recalling the entire outstanding loan. Despite repeated demands, since the respondent No.1 failed to clear the dues, the petitioner in exercise of its right under the loan agreement sold the securities pledged with it and realised an amount of Rs.78,50,066/-, which was credited to the account of the

respondent No.1. Thereafter the petitioner initiated arbitration proceedings for recovery of the balance amount. During the pendency of the arbitration proceedings, the remaining pledged securities were also sold and a further amount of Rs.17,47,900/- was recovered, which was also credited to the account of the respondent No.1. During the pendency of the arbitration proceedings, the respondent No.1 filed a suit being Suit No.3349 of 2002 in the City Civil Court and obtained an ex parte injunction restraining the petitioner from encashing the cheques which were issued for the amount of Rs.1,45,00,000/- and Rs.14,32,807/-. The arbitrator declared his award on 23-12-2002 and thereunder directed the respondent No.1 to pay to the petitioner a sum of Rs.82,26,164/- together with interest at the rate of 16% per annum on the sum of Rs.94,94,183/- from the date of filing of the statement of claim till 21-6-2002, and a sum of Rs.77,46,283/- from 22-6-2002 till the date of the payment together with the costs of Rs.3,25,000/-. Since the injunction order was to remain in force till the disposal of the arbitration proceedings, consequent to receipt of the award it stood vacated, the petitioner deposited cheques of Rs.1,45,00,000/- as well as Rs.14,32,807/- with the bankers but the same were dishonoured on account of the instructions issued by the respondent No.1 for stop-payment. The notices under Section 138 of the Negotiable Instrument Act were issued

to the respondent No.1 on 6-1-2003 consequent to the bouncing of the said two cheques. However, the claim for dues in the notices was restricted to the extent of the amount payable under the award, and the demand was not extended to the whole of the amount specified in the cheques. Since the respondent No.1 did not pay any amount inspite of receipt of the notices, the complaints were filed in the Court of the Chief Judicial Magistrate, Thane being Criminal Complaints Nos.544 and 545 of 2003.

4. The petitioner received a notice dated 3-12-2004 issued by the respondent No.2 calling upon the executive director and the other senior officers of the bank to attend the office of the respondent No.2 for the purpose of investigation in relation to the complaint dated 6-11-2004, filed by the respondent No.1. One Charudutt Khona, Vice-President of the petitioner-Bank, being conversant with the facts of the case attended the office of the respondent No.2 in response to the said notice Further, under the letter dated 7-12-2004 the petitioner forwarded the relevant papers and the documents along with the copies of the award and the orders of the Court in respect of the said loan transaction and simultaneously requested for the copy of the complaint filed by the respondent No.1.

5. It is the contention of the petitioner that only allegation in the complaint, as was informed to them, is that the petitioner through its director and officers are seeking to extort money from the respondent No.1 over and above the amount due and payable and therefore action should be taken against them. It is, however, the case of the petitioner that the liability of the respondent No.1 having arisen primarily from the loan agreement dated 15-9-2000 and confirmed under the arbitration award dated 23-12-2002, the respondent No.1 is under legal obligation to pay the dues and any proceedings initiated by the petitioner to recover the same, by following the procedure known to law, it cannot be said to involve any criminal offence, much less cognizable offence, for investigation by the police. Even otherwise, in case of investigation by the police, it is primarily required for the police to register FIR and only thereupon to proceed with the matter in accordance with the provisions of law. Merely for the purpose of preliminary enquiry, question of asking the parties to attend the police station does not arise at all. It is further contention on behalf of the petitioner that on the basis of the complaint stated to have been lodged by the respondent No.1, no offence whatsoever is made out and therefore there is no occasion for the respondent No.2 for issuance of summons or notice calling upon the petitioners to attend the

police station as well as to investigate into the matter. The action of the petitioner-company in initiating the proceedings under Section 138 of the Negotiable Instruments Act, 1881 is merely in exercise of their statutory right guaranteed to the petitioners under the said statute and arising out of the contract between the parties, besides being confirmed on adjudication in the arbitration proceedings by the award on 23-12-2002. The investigation by the respondent No.2 virtually amounts to interference in the said statutory right available to the petitioners and the remedies assured to the petitioners under the said statute, as well as being duly confirmed by the arbitration award, and therefore it is not only unwarranted but illegal for the police to intervene in the matter. In any case, according to the petitioner, there being no criminal offence disclosed and it is purely a civil liability and therefore by issuing summons for attending the police station, the respondent No.2 is clearly misusing his powers and harassing the petitioner-bank and its officers.

6. The respondents, on the other hand, contend that nothing prevents the police authorities to hold preliminary enquiry prior to recording of FIR and in that regard Rule 113 of the Bombay Police Manual, 1959 is sought to be referred to. It is their further

contention that the complaint filed by the respondent No.1 discloses criminal breach of trust and cheating on account of sale of the shares pledged with the petitioner by the respondent No.1, and further that inspite of substantial amount being deposited, the cheques in possession of the petitioner were sought to be encashed and illegally monies were to be extorted. It is further contention of the respondents that the call letter was sent to ascertain the truthfulness of the complaint received against the banking company and to know the nature of the complaint i.e., whether it is cognizable or not.

7. It is not in dispute that the respondent No.1 was the loanee under the agreement of loan dated 15th September, 2000 and pursuant to which three post-dated cheques, as stated above, were issued by the respondent No.1 in favour of the petitioners and they were delivered to the petitioners and were in possession of the petitioners till they were presented for encashment. It is also not in dispute that on account of the allegation of breach of the terms of the loan agreement, notice was issued to the respondent No.1 which was followed by the arbitration proceedings and under the arbitration award certain amount, as stated above, was due and payable by the respondent No.1 to the petitioners. It is also not in dispute that the

securities pledged with the petitioners were sold and the proceeds thereof were credited to the account of the respondent No.1. It is also a matter of record that the restrain order against the petitioners in relation to the encashment of the post-dated cheques was restricted till the pendency of the arbitration proceedings. In other words, on conclusion of the arbitration proceedings and passing of the award, the petitioners were not prohibited from encashing the said cheques towards the amount due and payable to them. Undoubtedly, the amount due and payable under the cheques was in excess to the amount actually due and payable under the award. However, fact remains that the said cheques could not be encashed as the drawer, the respondent No.1, had already ordered stop payment, and the Court order did not stop the petitioner from encashing the cheques after the declaration of the award by the arbitrator, besides that on dishonour of the said cheques, the respondent No.1 was served with a notice by the petitioners in terms of the provisions of Section 138 of the Negotiable Instruments Act wherein the amount claimed as due and payable was restricted to the amount in accordance with the award passed by the arbitrator and yet the respondent No.1 had neither paid the amount claimed nor had disputed the liability. In fact, the last para of the said notice reads thus:

"12. In the circumstances aforesaid, I am instructed to call upon you Nos.1 to 6 and demand from you, which I hereby do to pay to my clients an amount of Rs.93,80,505/- together with interest at the rate of 16% per annum on a sum of Rs.77,46,283/- from the date hereto, till date of payment or realization. Though the cheque amount is for Rs.1,45,00,000/- the amount payable as per the Award is Rs.82,26,164/- together with interest at the rate of 16% per annum on a sum of Rs.94,94,183/- from the date of filing of the Statement of Claim (i.e. 27th February, 2002) till 21st June, 2002 and on a sum of Rs.77,46,283/- from 22nd June, 2002 till date of payment or realization and I therefore call upon you Nos.1 to 6 to pay to my client the amount as mentioned hereinabove, within a period of 15 days from the date of receipt of this notice by you, being the amount of dishonoured cheque as mentioned hereinabove, failing which I have instructions from my client to file a criminal complaint against you in a competent Magistrate's Court,

without any further notice to you which please note."

Obviously, irrespective of the fact that the cheques were for Rs.1,45,00,000/- and Rs.14 lakhs and odd, the amount demanded consequent to the dishonour of the cheques was equivalent to the amount due and payable under the award. It is not the case of the respondents that there was any challenge to the said award. It was never the case of the respondent No.1 that the award was challenged at any point of time. It was never the case of the respondent No.1 that the restrain order by the City Civil Court was effective even after the disposal of the arbitration proceedings. It is not the case of the respondent No.2 that they were unaware of all those proceedings in the matter. Certainly the respondent No.2 had enough opportunities to peruse and understand the said award, the order passed by the City Civil Court, the notice issued by the petitioner to the respondent No.1 under Section 138 of the Negotiable Instruments Act and the loan agreement dated 15th September, 2000.

8. It was apparent that the dealings between the parties were in relation to the amount due and payable pursuant to the loan agreement, crystalized by the award passed in the arbitration proceedings. Undisputedly,

the injunction order obtained from the City Civil Court was to remain in force till the disposal of the arbitration proceedings. Being so, after the disposal of the arbitration proceedings, there was no restriction upon the petitioner for encashing the said cheques. Undoubtedly, under the arbitration award a sum of Rs.82,26,164/- along with interest at the rate of 16% per annum was required to be paid by the respondent No.1 to the petitioner. In the circumstances, there was nothing placed before the police authorities to disclose that the petitioner was either in illegal possession of the said two cheques or that they had illegally tried to encash the said cheques. It is not a case of theft of the cheques or misuse of the cheques or misappropriation of the amounts payable under the said cheques by the petitioner. It cannot be said that any proceedings initiated in the Court of law for recovery of such amount in accordance with the procedure known to law would amount to either criminal breach of trust or cheating. Undisputedly, the demand under the notice was in accordance with the award, which was not challenged. Therefore, as far as the cheques in question are concerned, there was no offence of cognizable nature committed by the petitioner.

9. Undoubtedly, once a security is delivered to the creditor, and merely on the pretext of breach of the

conditions of the loan agreement, such security or part thereof is disposed of without the knowledge and/or consent of the debtor, it could amount to a case of criminal breach of trust. However, in the matter in hand, it is apparent that the proceeds from the sale of the securities were credited to the account of the respondent No.1 to discharge his liability in respect of the debt arising out of the loan agreement, and there was no retaliation of whatsoever nature by the respondent No.1 in relation to such acts on the part of the petitioner. Being so, it cannot be said that the disposal of such part of the securities would per se amount to criminal breach of trust or cheating. Besides, once undisputedly the Court was seized with the matter and the parties were before the Court and the claim by the creditor in such proceedings was restricted to the amount due and payable under the unchallenged award lawfully passed in the arbitration proceedings, there can be no case of either criminal breach of trust or cheating and certainly not in relation to the subject-matter of the transaction in which the arbitration award was passed and followed by the proceedings for recovery of the amount on account of dishonour of the cheques which were deposited by the creditor towards the repayment of the loan amount obtained by the debtor under the loan agreement, duly confirmed by the arbitration award. The fact that the

disposal of shares does not prima facie disclose the offence of criminal breach of trust is apparently revealed from the contents of the affidavit in-reply filed by Smt. Sulbha Mahadeo Patil, Asst. Police Inspector attached to the Economic Offences Wing, Crime Branch, CID, Thane wherein she has stated that:-

> "It was also the contention of the complainant that even though the petitioner had received an amount of Rs.95,97,966/- they had sold the shares of the complainant which were kept by way of security and they had also deposited the cheques even though the amount mentioned in the cheque was not due and payable to them. It was also their contention that the shares were sold by the petitioner through their broker who was also an interested party and were deliberately sold when the prices had dropped owing to attack on World Trade Centre.
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> 7. I state that from the above averments it was apparent that the contention of the complainant was prima facie about the offence of criminal

> breach of trust and cheating since the shares pledged with the petitioner were deliberately sold through the interested company of the petitioner when the prices of the share were downed and the petitioner even after receipt of the substantial amount deposited the cheques which were for very high value than the actual amount due and payable to the petitioner."

The reason given for arriving at the conclusion about commission of the offence of criminal breach of trust and/or cheating apparently discloses over-enthusiasm on the part of the police officer to arrive at the said conclusion without ascertaining the facts of the case. Once it was disclosed that the dispute between the parties related to the loan transaction and loan recovery proceedings and in that regard already there is an award passed in arbitration proceedings and the amount under the award passed therein is due and payable by the complainant and since it is sought to be recovered by following the procedure known to law, and as regards the share certificates, there was no challenge against the disposal thereof in the manner known to law nor any objection was raised to the proceeds being credited to the account of the

complainant, i.e. the respondent No.1, one fails to understand how the police officer could have arrived at the conclusion about the offence of criminal breach of trust and/or cheating. Being so, on the basis of the materials placed before the police authorities, there was neither a case of criminal breach of trust nor of misappropriation of the amount nor of cheating and therefore there was no cognizable offence disclosed for the purpose of the police to investigate into the matter. Apparently, there was no justification for the respondent No.2 to keep on calling the officers of the bank to the police station and that too without making any record in that regard in the station diary. Certainly such acts on the part of the police authorities give rise to suspicion about the bona fide of the police officer involved in such matter.

10. As regards the entitlement of holding preliminary enquiry even prior to recording of FIR, it cannot be disputed that in a given case such an enquiry could be necessary and indeed the judicial pronouncement to a limited extent in that regard by the Apex Court certainly supports the said contention on behalf of the respondents. Undoubtedly therefore, it will have to be observed that the same would depend upon the facts of each case and it may not apply as a general rule in each and every case. In cases where the accusations made in

the complainant are doubtful, certainly the police authorities can enquire as to whether the accusations prima facie appear to be disclosing a cognizable offence. But in no case the respondent No.2 can be heard to say that they would not make any record in relation to such an enquiry or the steps taken by them in relation to such preliminary enquiry in the station diary. In fact, the Rule 113 itself lays down the guidelines and the necessity for such recording in the station diary. The sub-rule (12) of Rule 113 clearly provides that:-

> "It is always advisable, before recording first information, to warn the informant against giving false or exaggerated information and also to give him an opportunity to think coolly what he wishes to say. If the information, though whatever channel received, does not disclose a cognizable offence but indicates the necessity for further enquiry, the Police Station officer should note the information in the station diary and proceed to the place concerned; and if after inquiry he is satisfied that the facts disclose a cognizable offence, he should deal with

it according to law.

> Care should, however, be taken not to effect arrest unless adequate evidence is available against the accused."
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> (emphasis supplied)

Obviously, the Rule clearly requires that if the investigation officer considers it necessary to conduct preliminary enquiry before recording FIR, such officer shall record the information in the station diary before proceeding to enquire into the matter even for the purpose of ascertaining the truthfulness of the accusation. Therefore, the contention of the respondents that it is not necessary to make any record regarding the complaint filed by the complainant before the preliminary enquiry and that without having any such record being made, they can proceed to enquire into the matter as a preliminary enquiry, cannot be accepted. The station diary should definitely disclose even the preliminary steps taken or any step taken towards the preliminary enquiry by the police officer pursuant to the complaint lodged by any person with him. The station diary also should disclose if any person is called to the police station as to at what point of time

he is called, when he has attended the police station and upto what time he had been in the police station, and for what purpose. No person should be called to the police station merely at the whims and fancies of the police officer or officers. If any person is called to the police station, the report in that regard should be reflected from the station diary. It should also disclose the purpose behind calling the person and the necessary particulars, at least in brief, in that regard should find place in the station diary. The Police Manual clearly speaks to the contrary. In the Police Manual under the Standing Order No.34 and the Clause (1) thereof, it is clearly provided that the station diary is the authentic record in chronological order of all occurrences at the police station or branch or sector and of the various duties performed by the officers and men of that police station, branch or sector. The Clause (3) thereof enumerates some of the events and occurrences which must necessarily be recorded in the station diary and the sub-clauses (2) and (8) thereof read thus:-

> "(2) The time of registration of all cognizable and non-cognizable cases, showing the sections of law under which they were recorded.

> (8) Time of departure and return of officers going out for enquiries, to Courts, other police stations or offices or on leave, etc. An officer leaving for enquiries must invariably, but briefly, mention the nature of the enquiry, and the destination but, if the enquiry is of a confidential nature, he should merely refer to the relevant correspondence by quoting the A.C.P's forwarding number. In the absence of any correspondence touching the matter, the officer should merely state "Left for confidential enquiries", the details of such enquiries being reported to the officer in charge on return to the police station.

11. Totally unconvincing explanation is sought to be given as regards reasons for the calling of the persons to the police station for the purpose of preliminary enquiry instead of the police holding a discreet enquiry before recording of FIR. It is stated in the affidavit in-reply that:-

> "It would be pertinent to point out here that normally the police authorities

> issues call letters and calls upon the person against whom allegation is raised in the application to enquire from them regarding the genuineness of the contentions raised in the said application, so as to enable the police authorities to arrive at a conclusion whether the facts of the application discloses a cognizable offence. It is also not appreciated by the general public and citizens that the police visits their place of residence or office premises for the purpose of enquiry and the same is considered by them as if their image is tarnished and their reputation is damaged in the eyes of society and this results in unnecessary levelling of false allegations against the police officers stating that harassment has been caused even when the police has merely visited their residence or office for the purpose of simple enquiry."

Apart from making the submission as above, not a single instance of the alleged allegation against the police has been disclosed in the affidavit. That apart, merely

because some members of the public choose to take delight in making unwarranted allegations against the police authorities, that by itself would not be a justification for the police to get baffled and/or to call the persons to the police station to ascertain the genuineness of the allegations in a complaint. In cases where the police authorities are required to hold preliminary enquiry, it should preferably and of course, as far as possible, be a discreet enquiry. It however, does not mean that the investigating officer cannot call any person to the police station for the purpose of preliminary investigation. But, it can not be as a rule. It should be by way of exception. In any case, the apprehension expressed by the respondents cannot be a justification for non-compliance of the provisions of Rule 113(12) of the Bombay Police Manual by the police authorities. The said Rule is very clear and it needs to be followed in letter and spirit and lame excuses would not justify the flouting of the said Rule by the police authorities.

12. On reading the affidavit in-reply dated 13-1-2005, filed by Shri S.M. Patil, Assistant Police Inspector, attached to the Crime Branch, CID, Thane, it appears that the said police officer does not know how to ascertain whether the information given to him under Section 154 of the Code of Criminal Procedure disclose

cognizable offence. It has been stated in para 9 of his affidavit that:-

> "I most respectfully say and submit that the representative of the petitioner company was called to my office only to ascertain the truth in the complaint received against his company and to know the nature of complaint whether cognizable offence is made out or not."

However, few paras earlier in para 6 of the same affidavit the officer has stated:-

> "that enquiry into the application filed by the applicant is required to be done as unless the said application is enquired into it cannot be ascertained whether the contents of the application given by the applicant are true or not."

There cannot be doubt that once a complaint is filed, it is necessary for the police to ascertain whether the facts stated therein are true or false and whether the same disclose any cognizable offence or not. However, the modalities of ascertaining the truthfulness of the allegations in the complaint would depend upon the

nature of the allegations and the nature of the offence alleged. In case of criminal breach of trust or cheating, for ascertaining the truthfulness of the allegations, primarily it would be necessary to ascertain the same by asking the complainant to disclose cogent materials regarding the ingredients of such offence by the accused and unless such materials are disclosed and the police officer is prima facie satisfied about the commission of such offence, question of calling the person accused of commission of such offence cannot arise, unless, of course in an exceptional case it may be otherwise. But such an exceptional case is to be made out by the complaint or at least the police officer should be satisfied about the same. Undoubtedly, once such materials are produced and if the same disclose cognizable offence, the police officer can certainly investigate into the matter by following the procedure prescribed for investigation in relation to such offence. Whether a complaint discloses cognizable offence or not, it is to be primarily decided based on the contents of the complaint and the materials in support of thereto or as a result of discreet enquiry. In a deserving case enquiry can be made with the person accused of having committed the offence. This elementary knowledge should be possessed by every police officer empowered to investigate into cognizable offences.

13. For the reasons stated above, therefore, the petition succeeds and the rule is made absolute in terms of the prayer clauses (a) and (b) with no order as to costs.

(R.M.S. Khandeparkar, J.)

(P.V. Kakade, J.)